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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. KEVIN JEROME BLACK, Defendant and Appellant.	F055557 (Super. Ct. Nos. 1221264 & 1221355) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Stanislaus County. Nancy Ashley, Judge.

Thomas M. Singman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Louis M. Vasquez and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

A jury convicted appellant, Kevin Jerome Black, of three counts of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)[1]; counts 5-7), and found true enhancement allegations that appellant, in committing each offense, personally used a firearm within the meaning of section 12022.53, subdivision (b) (section 12022.53(b)). The jury deadlocked on four other counts of second degree robbery (counts 1-4), and the court declared a mistrial as to those counts. Thereafter, appellant pled no contest to each of counts 1 through 4, and the court granted the prosecution motion to dismiss the firearm-use enhancements that were alleged in connection with each of those counts. The court imposed a prison term of 12 years, consisting of the two-year lower term on the count 5 substantive offense and 10 years on the accompanying section 12022.53(b) enhancement. The court imposed concurrent terms of 12 years on each of counts 6 and 7 and the enhancements accompanying each of those counts, and concurrent two-year terms on each of counts 1 through 4.

On appeal, appellant's sole contention is that the evidence was insufficient to support the firearm-use enhancements in counts 5, 6 and 7. Specifically, while not disputing that the evidence was sufficient to support the conclusion that appellant and two other persons participated in a robbery in which one of the robbers used what appeared to be a firearm, appellant argues that the evidence was insufficient to establish that (1) he was the robber who used the purported firearm or that (2) the purported firearm was, in fact, a firearm. We will affirm.

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1 All statutory references are to the Penal Code.

FACTS

The Robberies[2] and Subsequent Identifications

On January 4, 2007 (January 4), shortly after 10:00 p.m., Nicholas Allen, Michael Dietz and Mark Friesen were walking to a friend's house in the area of Modesto Junior College in Modesto when a car pulled up and stopped in front of them.

Allen testified to the following. There were three people in the car. Two of them, one of whom Allen identified in court as appellant's co-defendant, Kevin Johnson, got out of the car, approached Allen and his two friends and "told us to take all of our stuff out of our pockets and hand it to them." Johnson had a knife, and the other person who got out of the car, whom Allen was unable to identify in court, "pulled out [a] gun[] [and] cocked it ...." At that point, Allen removed a cell phone and wallet from his pocket; Dietz and Friesen each removed from their pockets a cell phone, wallet and Ipod; and the three victims handed these items over to the two robbers.

Dietz testified all three persons got out of the car, and that one of them, who got out of the car on the left side, "pulled out a gun and cocked it." In court, Dietz was unable to identify any of the three robbers.

Friesen testified to the following. He could not "remember exactly," but he thought three men got out of the car. One of the robbers, who stood approximately two feet away from Friesen, had a gun. Allen and Dietz were standing right next to Friesen. The robbers were male and "darker skinned" rather than "lighter skinned," but beyond that he could not remember what the robbers looked like.

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2 We use the term "the robberies," unless otherwise indicated, to refer to the robberies charged in counts 5, 6 and 7. The prosecution presented evidence that appellant committed the robberies charged in counts 1 through 4, to which he eventually pled no contest, on the night of January 4, in two separate incidents, prior to the robberies charged in counts 5, 6 and 7.

At approximately 10:12 p.m. on January 4, City of Modesto Police Officer Nick Bloed, was notified "via dispatch" to be on the lookout for a white car containing three to four black males who had committed a robbery. Shortly thereafter, the officer effected a stop of a vehicle; appellant was the driver and his two passengers were Kevin Johnson and Rashaad Franco. Shortly after that, City of Modesto Police Officer Daniel Gonzales transported Allen, Dietz and Friesen to the scene of the vehicle stop, approximately one to two miles from the scene of the robberies. Friesen identified the car as the one driven by the robbers but could not identify any of the car's occupants. Allen identified Franco as the person who was "armed with the knife," and appellant as the person who was "armed with a handgun." Dietz identified Franco and appellant as the robbers, and appellant as the one who was "armed" "with a handgun."

City of Modesto Police Detective Darren Ruskamp testified that he interviewed appellant on the night of January 4, and that appellant stated the following. He participated in the robbery of "three males walking near the Junior College." He was "one of the passengers." He and Franco got out of the car, and the two "ask[ed]" the victims "for their property." Franco "had a fake gun in his possession."

Firearm Evidence

Officer Bloed testified to the following. After appellant and his two companions were taken into custody, several officers, at the scene of the vehicle stop, conducted a search of the car in which the three subjects were riding. After that "initial search," while still at the scene of the stop, Officer Bloed searched the trunk. There he found an item he described as a "black plastic air soft-style BB gun or pellet gun" and a "semiautomatic plastic toy gun." It was "not a real firearm." It "ha[d] some tape over the slide," and it appeared to be a "replica of a 1911 Colt .45 ...." "It probably would function ... as a pellet pistol"; it would not "fir[e] a real cartridge."

City of Modesto Police Officer Ben Brandvold testified to the following. He and Detective Ruskamp searched the car while it was parked in a lot at the police station. In the "passenger area," Officer Brandvold found a black ski mask, and in the trunk, he found a "black semiautomatic .45 caliber handgun, [which he] recognized to be a Glock handgun." The gun is loaded by "pull[ing] back the slide."

Detective Ruskamp identified People's Exhibit 7 (Exhibit 7) as the "replica gun" that "was found in the back seat on the floorboard along with" the black ski mask."

Rashaad Franco testified to the following. While committing the robberies, Franco had the replica gun, Exhibit 7, "in [his] hands." At one point on January 4, prior to the robberies, he saw, "in the back seat or something," "a real [gun] and a fake one."

Detective Ruskamp "interview[ed]" Franco on the night of the robberies. A video tape of the interview was played for the jury. In the interview, Franco stated the following. In the robbery of the "three kids" near Modesto Junior College he did not have a weapon, but appellant "had this like little plastic gun." Franco first stated, "It was just black. Like if you had seen it, you ... would've shot me." Moments later when asked if "it looked pretty real," Franco responded, "Yeah, like if I was him, you know I would ... [¶] ... [¶] Nah. It looked plastic though."

After the interview of the video tape was played, Franco was asked, "How many total guns, both real and fake, did you actually see in the car?" He answered, "Three." He further testified to the following. At no point, during any of the robberies on January 4, did he see appellant holding a "real gun." There were two "plastic guns" in the car that night, but one "was lost ... somewhere through the night." That plastic gun "could have fell out of the car." It was not in the car when they were on their way "back to Modesto"

after the count 3 and 4 robberies committed earlier that evening. It was black. It "[c]ould have been mistaken for a real gun, but it looked fake."[3]

DISCUSSION

As indicated above, appellant challenges the sufficiency of the evidence supporting the personal-use-of-a-firearm enhancements found true in connection with the robberies of Allen, Dietz and Friesen.

Standard of Review

In reviewing the sufficiency of the evidence supporting a sentence enhancement, we apply the same standard we apply to reviewing the sufficiency of the evidence supporting a conviction. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1058.) Thus, we apply the following principles:

In addressing a challenge to the sufficiency of the evidence supporting an enhancement, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--evidence that is reasonable, credible and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "[W]e do not reweigh the evidence; the credibility of witnesses and the weight to be accorded to the evidence are matters exclusively within the province of the trier of fact." (*People v. Stewart* (2000) 77 Cal.App.4th 785, 790.) "To warrant the rejection of the statements given by a witness who has been believed by the [trier of fact], there must exist either a physical impossibility that they are true, or their falsity must be apparent

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[3] We discuss other evidence adduced at trial as such evidence becomes relevant to our discussion.

without resorting to inferences or deductions." (*People v. Barnes* (1986) 42 Cal.3d 284, 306, internal quotation marks omitted.) "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment." (*People v. Cantrell* (1992) 7 Cal.App.4th 523, 525.)

We review "the entire picture of the defendant put before the jury-and [we] may not limit our appraisal to isolated bits of evidence selected by the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577.) "'[I]t is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts."' [Citation.]" (*Ibid.*) Finally, "[e]vidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Contentions and Analysis

Section 12022.53(b) provides for a 10-year enhancement for the personal use of a "firearm" during the commission of a robbery. (§ 12022.53, subds.(a)(4), (b).) There is no dispute that the evidence was sufficient to support the conclusion that in the commission of the robberies, one of the robbers personally used an object that purported to be a firearm. Appellant's first argument is that the evidence was insufficient to support the conclusion that *he* was the gunman. We disagree. The prosecution presented evidence of the following: shortly after 10:00 p.m. on January 4, appellant and two other persons robbed victims Allen, Dietz and Friesen; one of the robbers, standing approximately two feet from the victims, "pulled a gun" and "cocked it"; and a short time later, Allen and Dietz identified appellant as the robber with the gun. From this evidence, the jury could have reasonably concluded that the two victims' in-the-field identifications were accurate, and, therefore, appellant was the gunman.

Appellant argues that the evidence summarized above, and in particular the evidence that Allen and Dietz identified appellant as the gunman, does no more than raise a suspicion that *appellant* personally used a firearm in the commission of the robberies, and that the identification evidence, when considered in light of the entire record, "does not amount to substantial evidence sufficient to support the challenged true findings." Specifically, he asserts, first, that appellant and his two cohorts were similar in appearance, and, therefore, "it would have been easy to choose incorrectly among them," and second, "[o]ther much more convincing evidence, shows that Franco was the gunman ...."

Appellant bases this latter point, in part, on evidence as to where the three robbers were sitting in the car at various points. As appellant notes, Dietz testified the gunman got out of the car on the driver's side, and that on the night of the robberies, he (Dietz) told Officer Gonzales that the driver never got out. Therefore, appellant asserts, the gunman must have exited from the back seat. However, Officer Bloed testified that when he stopped the car, appellant was the driver, and was, thus, in the front seat, and Franco testified that when he, appellant and Johnson set out that evening to begin their crime spree, appellant was sitting in the front passenger seat. Further, appellant argues, the following evidence establishes Franco was sitting in the back seat: Officer Bloed testified Franco was in the back seat when he stopped the car; Franco testified he was sitting in the back seat earlier that evening when he, appellant and Johnson first set out; and in the video-taped interview, Franco told Detective Ruskamp he was sitting in the back seat when the car pulled up to the scene of the robberies.

Appellant further argues that the following also shows Franco was the gunman: Dietz testified the gunman wore a "jersey"; Detective Bloed testified Franco's booking sheet indicated Franco was wearing a jersey at the time of his arrest; Dietz was unable to identify anyone in the courtroom as the gunman; Franco pled guilty prior to the trial of

appellant and Johnson; the court had ordered witnesses excluded, and, therefore, appellant asserts, Franco was not in the courtroom at the time Dietz was asked if he could identify the gunman; various "contradictory" statements made by Franco to Detective Ruskamp, some of which indicated appellant had a plastic gun during the robberies, "offer[] no support for the conclusion" that appellant was the gunman; appellant told Detective Ruskamp that Franco wielded a "fake gun" during the robberies; and Detective Ruskamp referred to the replica gun being found in the back seat where, appellant argues, the evidence shows Franco, and not appellant, was sitting.

The evidence to which appellant refers establishes, at most, a "justifiable suspicion" that Allen and Dietz incorrectly identified appellant as the gunman. (*People v. Cantrell*, *supra*, 7 Cal.App.4th at p. 525.) When we "presume[] in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence," and apply the principle that it is not our function to reweigh the evidence, we conclude that the evidence, most notably the testimony of the victims and the identification evidence, was sufficient to support the jury's conclusion that appellant was the robber who wielded the gun. (*People v. Kraft*, *supra*, 23 Cal.4th at p. 1053.)

As indicated above, appellant also contends the true findings on the count 5, 6, and 7 section 12022.53(b) enhancements cannot stand because, he asserts, the evidence was insufficient to establish that appellant wielded a real firearm. He argues that the evidence establishes the robbers had, in addition to a real semiautomatic handgun, two replica guns, which did not qualify as firearms, at least one of which was a very good likeness of a real gun; thus, there was only a one-in-three chance that the object seen by the three witnesses was a "firearm." Accordingly, he argues, the conclusion that the robber used a real gun was mere speculation. We disagree.

As used in section 12022.53(b), "firearm" is defined as "any device, designed to be used as a weapon, from which is expelled through a barrel, a projectile by the force of

any explosion or other form of combustion." (§ 12001, subd. (b).) "Thus, toy guns obviously do not qualify as a 'firearm,' nor do pellet guns or BB guns because, instead of explosion or other combustion, they use the force of air pressure, gas pressure, or spring action to expel a projectile. (§ 12001, subd. (g).)" (*People v. Monjaras* (2008) 164 Cal.App.4th 1432, 1435 (*Monjaras*).)

"The fact that an object used by a robber was a 'firearm' can be established by direct or circumstantial evidence. [Citations.] [¶] Most often, circumstantial evidence alone is used to prove the object was a firearm. This is so because when faced with what appears to be a gun, displayed with an explicit or implicit threat to use it, few victims have the composure and opportunity to closely examine the object; and in any event, victims often lack expertise to tell whether it is a real firearm or an imitation.... [¶] Circumstantial evidence alone is sufficient to support a finding that an object used by a robber was a firearm. [Citations.]" (*Monjaras*, *supra*, 164 Cal.App.4th at pp. 1435-1436.)

"[A] 'defendant's own words and conduct in the course of an offense may support a rational fact finder's determination that he used a [firearm].' [Citation.] Indeed, even though for purposes of section 12022.53, subdivision (b), a firearm need not be loaded or even operable, 'words and actions, in both verbally threatening and in displaying and aiming [a] gun at others, [can] fully support[ ] the jury's determination the gun was sufficiently operable [and loaded].' [Citation.] Accordingly, jurors 'may draw an inference from the circumstances surrounding the robbery that the gun was not a toy.' " (*Monjaras*, *supra*, 164 Cal.App.4th at pp. 1436-1437.) "Simply stated, when ... a defendant commits a robbery by displaying an object that looks like a gun, the object's appearance and the defendant's conduct and words in using it may constitute sufficient circumstantial evidence to support a finding that it was a firearm within the meaning of section 12022.53, subdivision (b). In other words, the victim's inability to say

conclusively that the gun was real and not a toy does not create a reasonable doubt, as a matter of law, that the gun was a firearm. (See [*People v. Aranda* (1965) 63 Cal.2d 518, 532-533] ['Testimony by witnesses who state that they saw what looked like a gun, even if they cannot identify the type or caliber, will suffice' to prove 'the gun was not a toy'].)" (*Id*. at pp. 1437-1438.)

The evidence shows the following: (1) a genuine semiautomatic handgun was found in the robbers' car shortly after the robberies; (2) appellant's conduct--he "pulled," i.e., displayed, and cocked the gun--was threatening, providing support for the conclusion the gun was real (*Monjaras*, *supra*, 164 Cal.App.4th at pp. 1436-1437); and (3) all three victims described the object, without qualification, as a handgun. Thus, the circumstances surrounding the robberies provide ample support for the conclusion that the gun used was not a toy.

It is of no moment, for purposes of appellate review, that there was evidence that appellant and his cohorts had in their possession, at or about the time of the robberies at issue here, one or more replica guns. Appellant's argument on this point is one more appropriately made to the jury. Appellant effectively asks us to reweigh the evidence and/or draw different inferences from it, and we decline to do so. (*People v. Stewart*, *supra*, 77 Cal.App.4th at p. 790.) We conclude substantial evidence supported the section 12022.53(b) enhancements.

DISPOSITION

The judgment is affirmed.